No. 12331.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES I. ROSIN,

Appellant,

vs.

J. P. HART, Trustee in Bankruptcy of the ESTATE OF INTERNATIONAL MINING & MILLING CO., debtor, and SECURITIES AND EXCHANGE COMMISSION,

Appellees.

PETITION FOR REHEARING.

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408 South Spring Street, Los Angeles 13,
Appellant in Propria Personam.

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Appellant respectfully petitions the Court that a rehearing be granted in the above entitled matter. If Appellant has not presented the evidence on this appeal with sufficient clarity, it is perhaps due to some extent to the fact that he inadvisedly had himself for a client, and due to his personal feeling in the matter, has not presented it with the objectivity of one acting in the professional capacity of an advocate for his client. With due respect for the views of this Court, as set out in the opinion, may we respectfully present the following facts:

Without again raising the issue of the services performed prior to September 2, 1938, or the services rendered after the matter went into Chapter X proceedings, the record shows:

(1) That the Findings of Fact clearly indicate that the interim allowance was for services from September 2nd

to October 3rd, 1938, and that the compensation so allowed was for said services. [Findings XXV and XXVI.]

(2) This Honorable Court, in its opinion, questions whether Appellant represented the Trustees after the resignation of Mr. Trask in February, 1939. By this we presume that this Court does not question the representation of the Trustees until that date. In addition to other services performed by Appellant from October 3rd to the time of resignation of Mr. Trask, as shown by the record, is the resistance of Motion to Discharge Trustees (January 14, 1939, which was denied on February 6, 1939). In view of the Court's opinion, these services from October, 1938, the end of the period for which the trial Court found Appellant's services worthy of compensation, to February, 1939, is not compensated for.

(3) With reference to that part of the opinion of the Court questioning the representation by Appellant after the resignation of Mr. Trask, we respectfully direct attention to the fact that neither the record nor the Findings questions such representation, only the matter of direct benefit to the estate, which Finding we respectfully submit is not supported by the record. After Mr. Trask resigned, Mr. Buxton and Mr. Udell continued to act until the matter went into Chapter X proceedings, and no question was ever raised by either as to the representation by Appellant. Both Mr. Buxton and Mr. Udell at all times regarded Appellant as their attorney during all proceedings in the State Court, and not until some time later, when the matter of Appellant's representation came up in the United States District Court, was any question raised by anyone, and then only regarding the representation in the United States District Court. As for Mr. Logie, Appellant did not learn of his succession in place of Mr. Trask until

quite a time later. Nor did Mr. Logie ever take part in any activities, conferences or meetings with the other Trustees, except one meeting in June, 1939, immediately before the matter went into Chapter X proceedings. [Rosin Tr. p. 30, line 7, to p. 32, line 9; p. 76, line 19, to p. 77, line 4 (Buxton testimony).] The record is clear and unequivocal that so far as the State Court proceedings are concerned, Appellant's representation was never questioned by anyone, that it was with the approval of at least Mr. Buxton and Mr. Udell, and as for Mr. Logie, he never intimated at any time that he was dissatisfied with the representation. To this may be added that the State Court always considered Appellant as the attorney for its Trustees and entertained him as such until the matter went into Chapter X proceedings, and thereafter. As to the numerous services and Court appearances during that period, we will not impose on the Court by repeating the same, for they are set out in the record and in the briefs on file.

Our reason for referring to this portion of the term that petitioner rendered services is that the period of time as set out in the Findings of the trial Court are not in harmony with the period of time as stated by this Court in its opinion, and that for that reason, the same could not have been commented on in appellant's brief.

The evidence, we believe, clearly indicates that until June 30, 1939, appellant represented the trustees and not only Mr. Buxton. The evidence is also unquestioned that on the many appearances made for the trustees, not only was there no intimation by any one of the trustees that appellant did not represent them, but we feel quite certain that if the record in Superior Court action No. 1646 (which is part of the record in this proceeding) shows

the parties present in Court on all occasions up to June 30, 1939, when appellant appeared for the trustees, it will show that Mr. Udell was present and took part in the proceedings in which appellant appeared as trustees' counsel. Mr. Udell's letter to appellant in which he approves the representation of trustees by appellant [Ex. B] indicates his satisfaction of appellant, and the record does not dispute that he so regarded appellant during all of the State Court proceedings.

In view of the undisputed evidence of appellant's representation of the trustees and not only of Mr. Buxton, at all times, and the trial Court in its findings, not holding otherwise, we respectfully submit that at least this phase of the record is worthy further review.

Appellant is aware, as set out in the opinion of this Court, that an Appellate Court hesitates to disturb the orders on allowance of fees as made by the trial Court, yet we respectfully submit that the disparity between the provision of the order of the trial Court to any fair evaluation of the services is so great that it deserves correction. If the practice of law with Appellant were merely an avocation and not a profession and vocation, it may have been sufficient satisfaction to him in feeling that he has succeeded in a job well done (which statement we trust the Court will not consider too immodest for one who writes this as his own counsel), in having successfully resisted on each occasion the attempted attacks on the Trust by forces unfriendly to it, and in having assisted by his counsel and advocacy in the successful operation of the Trust, which has been the only successful period in the affairs of the corporations. The insignificance of the compensation to Appellant, who has prepared and appeared on numerous proceedings 350 miles from his office, taking

several days on each occasion, taking into account the fact that Appellant prevailed in all encounters in court proceedings, and the considerable improvement of the estate during the State Court trusteeship, as well as nearly a year's time and work faithfully devoted to the general affairs of the corporations, we respectfully submit is worthy of reconsideration.

It needs no lengthy argument to call attention to the fact that the $500.00 compensation to Appellant does not in any manner begin to defray the actual out-of-pocket expenses incurred in the maintenance of office facilities alone for the benefit of the estate business, not to mention the time, effort and services rendered by him personally. Even relating the $500.00 compensation to Appellant to the allowances to the Trustees of more than $5,000.00, whose duties in no manner interfered with their other business duties, and which consisted principally of occasional meetings and conferences (excepting the periodic examinations of the mine's progress by Mr. Udell), the compensation of Appellant is remote from any reasonable standard of computation.

We want to take this opportunity in referring to two inadvertencies which we desire to clarify to the Court. One was the matter of citing *Adams v. Woods,* 8 Cal. 306, in supplement memorandum requested by the Court at time of argument. Appellee's counsel is correct that the quotation was from counsel's argument printed with the opinion and not of the opinion. This inadvertence is because of the dating of the case being of the time when counsel's argument was printed with the opinion, which appellant in his haste did not discern. The other matter we owe apology to the Court for, is the hasty reply before verification thereof, when the Court at time of argument

inquired if a certain finding was also a "Do not finding," which appellant answered in the affirmative, being under the impression that all the findings on his petition were "Do not find" findings. We trust the Court will forgive these unintentional though careless inadvertencies.

In concluding this petition, we respectfully call attention to the fact that the record in this matter as presented by appellant is unrefuted, and unless it be regarded that both his verified petition and oral testimony as well as that of his witnesses be unworthy of belief, the order is contrary to any reasonable deduction from the evidence. This is not a case where it may be contended that the services were in any manner duplicated by others who also asked for compensation, or that any one but Appellant ever appeared, claimed to appear, or was recognized as counsel for the trustees.

At least as to the period from September 2, 1938, to June 30, 1939, it is difficult to reconcile doubt with the fact of such representation. True, counsel for the Securities and Exchange Commission as the interrogator at the hearing, did inquire whether specific instructions were received from all of the trustees with regard to various services rendered by Appellant. The Court may have made its findings from the inference of the questions. It could not have been from the evidence.

May it be remembered that counsel for the Securities and Exchange Commission, who was the interrogator at the hearing, and who made the recommendations for final order to the Court, had no personal knowledge of what had transpired years before in the State Court. His questions were either part of a "fishing expedition," or were inspired by others. (All persons who took part in the State Court proceedings, and were still alive, were present

in court.) It would have been a much fairer hearing to have such person or persons familiar with the State Court proceedings and who could refute petitioner, take the witness stand to do so. Rather than risk the witness stand, such person or persons were content to rely on prompting the counsel who interrogated appellant to ask questions which may cast doubt and inference as to the petitioner's cause and let the matter rest at that. In our view, this is not the recognized proper procedure.

We respectfully submit that this matter deserves the further consideration of this Honorable Court.

Respectfully submitted,

CHARLES I. ROSIN,
Attorney for Appellant.

Certificate of Counsel.

I, Charles I. Rosin, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

CHARLES I. ROSIN,
Attorney for Petitioner.